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IN THE

Supreme Court of the United States

October Term, 1961

CROWN ZELLERBACH CORPORATION,
Petitioner,

—against—

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF

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The Commission now agrees that *Columbia Steel** is applicable in analysis of the dimensions of the market in a Section 7 case, thus conceding error in a major and controlling premise of the decision below. Application of *Columbia Steel* would so change the dimensions of the relevant market and so substantially reduce Crown's share of the market as to require reversal on the merits.

The Commission's brief in opposition does not come to grips with the issues presented in the petition for certiorari but relies here on the fact that the Ninth Circuit expressed no doubts as to the correctness of its decision. This is not sufficient excuse for the Ninth Circuit's failure to heed the admonition in the *Chenery*** cases or for its reliance on "fragmentary" and "unsatisfactory" evidence as the basis for decision. The conflict between the Third and Ninth

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* *United States v. Columbia Steel Co.*, 334 U. S. 495.

** *SEC v. Chenery Corp.*, 318 U. S. 80 and 332 U. S. 194.

Circuits, demonstrated in the petition, has since been reaffirmed by two later decisions of the Third Circuit, in *Spalding** and *Scott Paper*,** discussed below.

1. The Commission's argument in this Court assumes the correctness of the Ninth Circuit's market definition; it does not, however, attempt to demonstrate that the Ninth Circuit was correct. Thus, although the Commission now concedes the applicability of *Columbia Steel* in Section 7 cases (Res. Br. 19-21), it cannot deny that the decision below was expressly based upon the holding that *Columbia Steel* was not applicable (A-30, 31) and that the Ninth Circuit explicitly refused to analyze the evidence in the light of this Court's holding in *Columbia Steel*.

The increase in market dimension required by *Columbia Steel*, and by the *Cellophane**** case and *Tampa Electric*****, the applicability of neither of which seems to be any longer in serious dispute (Res. Br. 19-20), makes inapposite all of the Court's findings as to competition and market shares. The Commission's only response is a cursory and unsuccessful attempt to argue that the Federal Trade Commission and the Ninth Circuit might have reached the same result if they had analyzed the facts in the light of these decisions, instead of rejecting them (Res. Br. 19-22). This, however, is a question which should be settled by remand with instructions to apply the cited deci-

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* *A. G. Spalding & Bros. Inc.* v. *FTC*, 5 CCH Trade Reg. Rep. ¶ 70,266 (March 22, 1962).

** *Scott Paper Co.* v. *FTC*, 5 CCH Trade Reg. Rep. ¶ 70,271 (March 27, 1962).

*** *United States* v. *E. I. duPont de Nemours & Co.*, 351 U. S. 377.

**** *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U. S. 320.

sions, a remand which, under *Chenery*, should be with directions to the Court of Appeals to remand to the Federal Trade Commission.

2. The Commission does not here dispute the applicability of the *Chenery* doctrine, but attempts to avoid its impact by labeling as "subsidiary findings" the Ninth Circuit's original findings as to the line of commerce, the section of the country, and shares of the market (Res. Br. 13, "1." at 14-16). That these are primary premises of the decision rather than "subsidiary findings" is too well established to become a point of contention. See *duPont-General Motors**; *American Crystal Sugar***; and *Transamerica****; see also *Cellophane* and *Columbia Steel*; and see Pet. 29-38. But if respondent's argument deserves to be taken seriously at all, it raises a most substantial question as to what *Chenery* means by "the grounds upon which an administrative order . . . was based" (318 U. S. at 87), in the context of review of Section 7 decisions, a question on which the Third Circuit has taken a view directly opposite to that espoused by the Ninth Circuit and the Commission's brief (see Pet. 38-40; pp. 4-7, *infra*).

3. The Commission disregards—because on the record there is no alternative—the clear demonstration of the major factual errors committed by the Ninth Circuit when, without the participation of counsel and without the guidance of any findings whatsoever on the subject by the Commission, the Ninth Circuit researched the record to make

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* *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. 586, 593.

** *American Crystal Sugar v. Cuban American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958).

*** *Transamerica v. Board of Governors*, 206 F. 2d 163, 169-170 (3d Cir. 1953), *cert. denied*, 346 U. S. 901.

the share of the market estimates which the Court found essential for decision and which the Commission had failed to make.

The Commission's attempted treatment of the survey evidence question not only fails to meet any of the issues raised but totally ignores half—and a clearly distinguishable half—of the point. The Hearing Examiner received the evidence and refused to strike it, but disclaimed basing his opinion upon *the part* of the survey evidence which is now Commission's Exhibit 176 (R. 585-86). The Commission reviewed the survey evidence and affirmed, disclaiming reliance upon the same *part* of the survey evidence (R. 620), but nevertheless insisted that it be printed for the Court of Appeals. The Court of Appeals reviewed it and in its opinion referred to relatively obscure details of it, but again disclaimed reliance upon the same *part* of the survey evidence (A-65, 66). Throughout, however, petitioner has complained not only of Commission's Exhibit 176, but the testimony of the Commission's only expert witness (R. 5162-5244), upon whom *no one* has ever disclaimed reliance, and which was based solely on the survey. (See Pet. 55, 57.)

4. Petitioner's facts and arguments are stated in its petition and they furnish the reply to the factual assertions and arguments in the Commission's brief in opposition. We need add only a discussion of the *Spalding* and *Scott Paper* cases, referred to in a footnote of the Commission's brief (Res. Br. 23 n.17, at 24), which were decided by the Third Circuit after the petition for certiorari was filed and which confirmed and sharpened the conflict, set forth in the petition, between the present case and the Third Circuit's

decision in *Erie Sand and Gravel**. These two decisions involved, as did *Erie*, appellate review of divestiture orders of the Commission under Section 7.

In *Spalding*, the Third Circuit affirmed a Federal Trade Commission finding that the acquisition of one large sporting goods manufacturer by another had violated the amended Section 7. In so doing, the Court scrupulously analyzed the grounds adduced by the Commission itself for the decision to ascertain whether those precise grounds could properly afford a basis for affirmance of the Commission's decision. The Court affirmed only after determining that the lines of commerce and section of the country found by the Commission could be approved as appropriate bases for the decision.

The Court expressly contrasted the procedure which it was following with the procedure of the Ninth Circuit in the instant case. Under a section of its opinion entitled "The Function of Appellate Review", the Third Circuit stated that (5 CCH Trade Reg. Rep. at p. 76,070)

> "In determining the question of reasonable probability [that competition would be lessened], however, it is well settled that the 'weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn therefrom are for the Commission.' . . . The function of the appellate court 'is limited to determining whether upon a review of the whole record it appears that the Commission's findings are supported by substantial evidence.'[32]"

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* *Erie Sand and Gravel Co. v. FTC*, 291 F. 2d 279 (1961).

The Court's footnote 32 reads:

> "*The recent Section 7 case decided by the Ninth Circuit seems to be contra.* In *Crown Zellerbach Corp.* v. *Federal Trade Commission*, 296 F. 2d 800 (1961), the court notes the dual system of enforcement of Section 7 and rejects the suggestion 'that because the Commission's "specialization and expertise" are peculiarly adapted to its intended task of policy "clarification and completion" our power to review these findings [of the Commission] is more limited than our power to review findings of a court,' citing *Matter of Pillsbury Mills*, 50 F. T. C. 555, 564-565 and Davis, Administrative Law Treatise, § 29.02. In *Zellerbach* the court applied '*the same "clearly erroneous" test in the same manner as if the findings . . . were those of a district court.*' 296 F. 2d at p. 815, n. 11." (Omission is the Court's; italics supplied.)

In *Scott Paper*, the Third Circuit set aside a Federal Trade Commission decision that Scott's acquisition of one pulp and two paper manufacturers had been in violation of the amended Section 7. Once again, the Court carefully analyzed the grounds of the Commission's decision and the evidence adduced by the Commission to support those grounds. The Court found that the chief coherent evidence relied upon by the Commission as a basis for its findings was a market survey conducted by the Commission. The Court further found that the disputed survey statistics, which covered only the years 1950 and 1955 and none of the intervening years, were capable of several alternative explanations and did not adequately support the Commission's findings, although they showed that Scott's market shares were larger in 1955 than in 1950. At this

point, rather than itself interpreting the survey data or itself searching other portions of the record, the Third Circuit remanded to the Commission, refusing "to resort to speculation as to what happened with respect to Scott's market shares during the years 1951 to 1954." (5 CCH Trade Reg. Rep. at p. 70,081). The Court pointed out that important issues of law were presented and that "the resolution of these issues of law requires that whatever factual premise may be asserted as the basis of their application be as definitive and revealing as may be possible and capable of proper assessment." (*Ibid.*)

By these decisions the Third Circuit has further demonstrated its fixed opposition to the affirmance of Commission decisions respecting legality of mergers under the amended Section 7 by resort to findings as to line of commerce, section of the country or market shares other than those used by the Commission in making its decision, and its refusal to determine, by speculative review of the record, whether it would have come to the same conclusion on different findings as to these basic grounds of decision.

This conflicts squarely with the Ninth Circuit's decision in the instant case, where the Court rejected the major premises of the Commission's decision and, instead of reversing, went on to find new and different grounds for the Commission's order, from a record which, moreover, was admittedly "unsatisfactory" and "fragmentary" with respect to market shares.

According to the Commission, the statement by the court below that this is not a "close case," viewed in isolation from the substantive analysis on the basis of which it was ultimately stated that this is "not a close case," justifies

whatever procedures may have been employed to reach those substantive conclusions. By this circular reasoning, however, the Commission may not set aside the normal safeguards and allocations of function which this Court has laid down to ensure the responsibility of the administrative process and the protection of the substantial rights of litigants.

CONCLUSION

The writ of certiorari, as respectfully prayed in the petition, should be granted.

Respectfully submitted,

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